Phillips Lytle LLP

**Via Electronic Submission** April 24, 2022

Hon. John P. Asiello
Clerk and Legal Counsel to the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: *Matter of Harkenrider, et al. v. Hochul, et al.* (APL-2022-00042)
Responsive Position Letter of Assembly Speaker Carl Heastie

Dear Mr. Asiello:

On behalf of Speaker of the New York State Assembly Carl Heastie (the "Speaker"), and in accordance with the letter of Deputy Clerk Heather Davis dated April 22, 2022, we submit this response to the letter of Misha Tseytlin, Esq. dated April 23, 2022 ("Pet. Ltr."), with respect to the above-captioned appeal.

## Jurisdiction

**This Court lacks jurisdiction to review Petitioners' contention that the Legislature cannot enact remedial maps.**

Throughout this litigation, Petitioners have contended that, if the redistricting maps are procedurally unconstitutional, the legislature cannot draw remedial maps. *See, e.g.*, Speaker's Reply Brief dated April 18, 2022 ("Speaker's Reply Br."), at p. 3. Supreme Court rejected their argument, but Petitioners did not appeal to the Appellate Division. *Id.* Consequently, Justice Curran determined the Appellate Division lacked jurisdiction "to further modify [Supreme Court's] judgment by eliminating an opportunity for the legislature to cure the legal infirmities" – even though Justice Curran, alone on the five-Justice panel at the Fourth Department, found the underlying argument meritorious. Curran Dissent dated April 21, 2022 ("Curran Dissent"), at p. 14.

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Petitioners' attempt to cure their procedural misstep is unavailing. They filed a notice of appeal from Supreme Court directly to this Court, claiming entitlement to an appeal under CPLR 5601(b)(2). But that provision does not apply here. It authorizes a direct appeal if "the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States." *Accord*, N.Y. CONST. art. VI, § 3(b)(2); Karger, Powers of the N.Y. Court of Appeals § 7:2; *Bay Ridge Cmty. Council v. Carey*, 58 N.Y.2d 821, 821 (1983). Petitioners' purported direct appeal does not involve "the validity of a statutory provision" at all—much less is such question the "only" one involved. Rather, their appeal asks what remedy is appropriate if the map-enactment procedure violated the State Constitution. Like at the Fourth Department, Petitioners' effort to wrest redistricting authority away from the Legislature is not reviewable here.[1]

**This Court can review whether Petitioners proved, beyond a reasonable doubt, that the Congressional map is substantively unconstitutional.**

The Plurality Opinion dated April 21, 2022 ("Plurality Opn."), held that Petitioners had "established beyond a reasonable doubt that the legislature acted with partisan intent in violation of article III, § 4(c)(5)," and that the Legislature's enactment of the 2022 Congressional plan (L.2022, c. 13, § 1) was unconstitutional. Plurality Opn. p. 8; Curran Dissent p. 12. Petitioners contend this Court lacks jurisdiction to review that determination. Pet. Ltr. p. 6. They are incorrect: for over a century, this Court has expressly claimed appellate jurisdiction to "review legislative action in reapportioning the state" and "to determine whether or not an act of apportionment is in conflict with the limits fixed by the Constitution[.]" *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 196-97 (1907).

To be sure, this Court generally reviews only "questions of law," not questions of fact. N.Y. CONST. art. VI, § 3(a); CPLR 5501(b). And "a question as to the weight of the evidence" is, in general, an unreviewable question of fact. Karger, Powers of the N.Y. Court of Appeals § 13:2. Critically, however, "a question as to the legal sufficiency of

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[1] For what it's worth, Petitioners are wrong on the merits. *See* Speaker's Reply Br. p. 11 n.2; *infra* p. 6.

the evidence" is a question of law. *Id.* A legal-sufficiency question, which this Court unquestionably may review, asks "whether it is reasonable to accept the evidence in question as adequate to support a particular conclusion." *Id.*

Two examples illustrate questions of legal sufficiency.

In *Matter of Grinker (Rose)*, the Commissioner of Social Services sought to appoint a conservator of an artist's property. 77 N.Y.2d 703, 705 (1991). Supreme Court appointed a conservator, and the Appellate Division affirmed. *Id.* at 705-06. This Court reversed, holding that the Commission "did not satisfy the procedural and evidentiary requirements … for the appointment of a conservator." *Id.* at 706. For instance, this Court determined that the evidence did not demonstrate the artist suffered a "substantial [mental] impairment," or that she was unable to manage her finances. *Id.* at 711.

Likewise, in *Schubtex, Inc. v. Allen Snyder, Inc.*, Supreme Court found that two parties had agreed to arbitrate a particular commercial dispute. 49 N.Y.2d 1, 5 (1979). The Appellate Division affirmed. *Id.* This Court reversed, determining that "the evidence adduced at trial [was] insufficient as a matter of law to support a finding of an express agreement to arbitrate." *Id.*

The Speaker's appeal here is like the appeals in *Grinker* and *Schubtex*. It asks this Court to determine that the evidence below—in particular, Sean Trende's flawed analysis—was legally insufficient to sustain a determination and Petitioners' burden to prove, beyond a reasonable doubt, that the enacted 2022 Congressional map was drawn in violation of the State Constitution. The Speaker maintains the various flaws "eviscerated the probative force" of Mr. Trende's analysis, and that the Plurality Opinion's baseless conclusions "cannot support" its holding of unconstitutionality. Speaker's Letter dated April 23, 2022 ("Speaker's Ltr."), at pp. 5, 7. As Presiding Justice Whalen and Justice Winslow correctly noted ("Whalen/Winslow Opn."), this appeal does not involve "the credibility issue routinely seen in battle-of-the-experts cases"—particularly when Respondents' experts did not seek to produce mapmaking simulations to compete with Mr. Trende's (because they had no burden to do so).

Whalen/Winslow Opn. p. 11. Rather, the issue is "the probative force of an expert opinion unsupported by sufficient evidence regardless of [R]espondents' opposition." *Id.*

Only last month, this Court evaluated the legal sufficiency of record evidence offered in support of an Appellate Division determination that a statute was unconstitutional. In *White v. Cuomo*, the plaintiffs sought a declaration that interactive fantasy sport ("IFS") contests are unconstitutional gambling activities. ___ N.Y.3d ___, 2022 WL 837573, at *1 (Mar. 22, 2022). Supreme Court agreed with the plaintiffs, as did the Appellate Division. *Id.* at *2. This Court reversed, concluding that "the legislature's factual determination that IFS contests are a game of 'skill,' not of 'chance'—and therefore are not 'gambling'—has resounding support." *Id.* at *7. This "factual determination" was dispositive of the ultimate issue: whether the law authorizing IFS contests violated the State Constitution.

As in *White*, here the ultimate question is the constitutionality of a statute—namely, of the Congressional map enacted in February 2022. And as in *White*, here this Court is asked whether the evidence is sufficient to justify a finding of unconstitutionality. By urging that the insufficiency of their evidence is immune from review, Petitioners imply that this entire Court should have shrugged its shoulders in *White* and dismissed the appeal for lack of jurisdiction. That erroneous view should be rejected, and this Court should evaluate the evidentiary record and determine that Petitioners' evidence was insufficient, as a matter of law, to carry their heavy burden to demonstrate unconstitutionality of the 2022 enacted Congressional plan beyond a reasonable doubt.

## The Merits

**The Appellate Division correctly determined that the Legislature's enactment of district maps was not procedurally unconstitutional.**

Four Justices of the Appellate Division correctly found the following regarding Article III of the State Constitution: first, that the Constitution "is silent as to the appropriate procedure to be utilized in the event the [Independent Redistricting Commission (the "Commission")] fails to submit a second redistricting plan to the legislature as

constitutionally directed"; and second, that "[n]othing in the Constitution … including subdivisions 4(b) and 4(e) of article III, expressly prohibits the legislature from assuming its historical role of redistricting and reapportionment if the [Commission] fails to complete its own constitutional duty." Plurality Opn. pp. 3-4. Consequently, in accordance with this Court's precedent affording great deference to legislative enactments—which carry a strong presumption of constitutionality—the four-Justice majority properly determined that: (1) "the legislature's exercise of its historically recognized redistricting authority upon the failure of the [Commission] to complete its constitutionally appointed tasks is consistent with Constitutional intent and is not 'a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein'" (Plurality Opn. p. 4, invoking *Matter of Sherrill,* 188 N.Y. 185, and *Cohen v. Cuomo,* 19 N.Y.3d 196 (2012)), and (2) the Legislature's enactment of a statute to fill the gap created by Article III's procedural silence was not unconstitutional (Plurality Opn. pp. 3-4).

The lone dissenting opinion of Justice Curran disregards the undeniable fact that in the final analysis, the Constitutional process set forth in Article III, viewed as a whole, vests exclusively in the Legislature the ultimate power over reapportionment, subject to judicial review if the enacted plan is substantively unlawful. Thus, while Article III charges the Commission with, among other tasks, presenting for legislative consideration a first, and potentially a second, round of proposed maps, the Legislature is at liberty to reject all Commission proposals for any reason, at which point the Legislature can, pursuant to unambiguous constitutional authority, fashion and enact whatever district lines it sees fit. Speaker's Br. pp. 26-28; Speaker's Reply Br. pp. 9-11. This structure aligns with the Appellate Division's holding that the Legislature's enactment of redistricting legislation was not procedurally unconstitutional, but it conflicts with the contrary view of the dissent and of Petitioners. Petitioners perpetuate this same analytical flaw in their letter here. Astonishingly, in their letter submission to this Court, Petitioners assert the 2014 amendments "eliminate the Legislature's historical redistricting authority." Pet. Ltr. p. 4. That is simply untrue.

Next, the Fourth Department majority specifically rejected Petitioners' contention, repeated in their letter submission, that Article III, §§ 4(b) and 4(e) of the State

Constitution strip the Legislature of its redistricting prerogative and divert it to a Court if the Commission fails to submit proposed plans for legislative consideration. Pet. Ltr. pp. 3-4; Plurality Opn. p. 4.

With respect to section 4(b), if anything, it supports the Fourth Department majority's reading of the State Constitution. Section 4(b) states that, "[i]f either house shall fail to approve the legislation implementing the second redistricting plan … each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary." Because the Legislature was entitled to adopt its own apportionment plan even when it received redistricting proposals approved by at least seven Commission members simply by rejecting those proposals, then *a fortiori*, it was entitled to adopt its own apportionment plan when the Commission failed to submit any such proposal. Speaker's Br. p. 28.

Additionally, the judicial review and remediation described in section 4(e) does not mean that only a Court may draw a redistricting plan when the Commission fails its constitutional responsibilities. There is no textual support for reading the Constitution to create a bifurcated remedial procedure depending on the nature of the fault found with the plan. To be sure, the text of section 5 includes a reference to "legal infirmities" and section 4(e) uses the phrase "violation of law," but the concept of a "violation of law" is not unique to section 4(e). The phrase "legal infirmities" in section 5 appears in the context of affording the Legislature the opportunity to correct "any law establishing congressional or state legislative districts found to violate the provisions of this article [III]" "in whole or in part" "in any judicial proceeding." Allowing the Legislature an opportunity to cure a judicially determined violation of Article III under section 5 before a court steps in to order a remedy under section 4(e), does not render "one or the other idle or nugatory" as Justice Curran posits. Curran Dissent p. 13.

Indeed, if the construction advocated by Petitioners (and the single Fourth Department dissent) were to prevail, it would empower a minority of Commission members—by refusing to meet or agree on plans—to redirect redistricting away from the Legislature to a Court, thereby denying the elective representatives of the People any role in that

process. Surely that cannot be the intended result of an amendment that originated with the Legislature, which approved it in two, separate legislative sessions.

**The evidence in the record is insufficient to support the plurality's conclusion that Petitioners proved their case beyond a reasonable doubt, and New York's enacted 2022 Congressional plan is constitutional.**

In contending the enacted 2022 Congressional plan is unconstitutional, Petitioners' letter largely rehashes arguments from their brief, and the Speaker has already addressed them. For example, the Speaker already explained why each of Petitioners' three standing arguments lack merit. Speaker's Reply Br. pp. 4-8. Additionally, Dr. Barber did not confirm or approve of Mr. Trende's analysis. *Id.* pp. 20-22; *contra* Pet. Ltr. pp. 6, 8-9. Further, Mr. Trende did not merely fail to account for communities of interest; he also addressed other mandatory factors (such as considering maintenance of the cores of existing Congressional districts) in only superficial, incomplete, or unknown ways. Speaker's Reply Br. pp. 19-20; Speaker's Brief dated April 13, 2022 ("Speaker's Br."), at pp. 42-44; Speaker's Ltr. pp. 8-9. Finally, Petitioners' comparison of the 2012 and 2022 maps' partisan leans is both meaningless and factually inaccurate. Speaker's Reply Br. pp. 15-18; Speaker's Ltr. pp. 6-7.

Two points deserve particular emphasis. First, Petitioners assert again that Respondents did not question Mr. Trende about his Maryland analysis. Pet. Ltr. p. 9; *see also* Pet. Br. pp. 45-46. But Petitioners disclosed Mr. Trende's analysis only after the close of testimony. In a letter to Supreme Court on March 28, 2022—nearly two weeks after testimony had ended, and three days before closing arguments—Petitioners *sua sponte* wrote the Trial Court a letter that urged Supreme Court for the first time to consider Mr. Trende's Maryland analysis. R. 2330-31. In doing so, they thereby opened the door for Respondents to argue why the Maryland analysis was, in fact, not favorable to Petitioners. *See Peck v. Goodberlett*, 109 N.Y. 180, 193-94 (1888); *Oppedisano v. Arnold*, 191 A.D.3d 794, 795 (2d Dep't 2021); *Giraldez v. City of New York*, 214 A.D.2d 461, 462 (1st Dep't 1995); Speaker's Reply Br. pp. 18-19. Further, during trial Mr. Trende "gave troublingly incomplete answers, choosing not to acknowledge the problems he

had encountered in Maryland even though those problems were directly implicated by the questions he was asked." Senate Brief dated April 13, 2022, at p. 43 n.5.

Once Petitioners expressly invited comparison on March 28, 2022, of Mr. Trende's Maryland analysis with the record here, Petitioners' strategy backfired, because the comparison is unfavorable and devastating to their case:

- Unlike Article III, § 4(c)(5), of the New York Constitution, nothing in the Maryland Constitution requires its Legislature to consider maintaining communities of interest. Mr. Trende's simulations in New York made no effort to try to keep communities of interest together (R. 1000) because, by Mr. Trende's own admission, "[c]ommunities of interest are a notoriously difficult concept to nail down … and difficult to encode" in generating simulated maps at random. R. 1043. With the same paragraph of New York's Constitution requiring the Legislature to consider maintaining communities of interest and refrain from drawing maps for the purpose of favoring or disfavoring certain political parties, Petitioners cannot seriously contend they satisfy their burden via simulations that claim to account for one part of the paragraph, but not another.

- Petitioners' counsel asserts Mr. Trende's analysis here entailed "the *same kind of analysis* that he did in Maryland[.]" SR-11 (emphasis added). Mr. Trende's 750,000 simulations in Maryland contained hundreds of thousands of redundant "duplicative maps" (R. 2394) that he needed to review and excise in order to make his sample representative. Speaker's Reply Br. p. 18. For his New York analysis, by contrast, Mr. Trende did not even review the simulated maps he created. R. 2615. For this reason, if Mr. Trende conducted "the same kind of analysis" in Maryland as here (SR-11), reasonable doubt exists as to whether Mr. Trende's New York simulations suffered from the same redundancy problem as his Maryland simulations, and thereby compromised the reliability of the "dotplot" they claim to be so persuasive here. Pet. Ltr. p. 6.

- Mr. Trende's analysis in Maryland was far more robust. He completed 750,000 simulations of Maryland's eight Congressional districts, but only 5,000, and then

another 10,000, of New York's 26 such districts. Speaker's Br. pp. 46-47. In Maryland, he used four metrics to evaluate simulated districts' compactness, whereas in his New York simulations, "only one compactness setting would avoid performance issues with the program." Whalen/Winslow Dissent p. 10.

All these circumstances substantiate the insufficiency of the evidence in the record to support the plurality's erroneous legal conclusion that Petitioners had "established beyond a reasonable doubt that the legislature acted with partisan intent in violation of article III, § 4(c)(5)," of the New York Constitution. Plurality Opn. p. 8.

Second, Petitioners complain the enacted "2022 [C]ongressional map made every competitive district more Democrat, while making the four remaining Republican districts far more Republican." Pet. Ltr. p. 10. Petitioners' proposal for the Courts to draw a new Congressional map that would decrease those districts' respective partisanship gaps between Democrats and Republicans itself would entail "favoring or disfavoring ... political parties" in violation of New York State Constitution Article III, § 4(c)(5). Even if this were permissible, moreover, Petitioners' proposal ignores the statewide reality since 2012 of burgeoning Democratic registration, juxtaposed with stagnating Republican enrollment. Speaker's Ltr. pp. 6-7. This reality explains why so many districts about which Petitioners complain have experienced partisan shifts toward Democrats. For example, from April 2012 to February 2021, the share of Democrats versus Republicans increased from 45.57% to over 49% in Congressional District 1 on Long Island (represented by Lee Zeldin), from 55.29% to nearly 58% in District 3 on Long Island (represented by Thomas Suozzi), from under 51% to over 55.9% in District 18 in the Hudson Valley (represented by Sean Patrick Maloney), from under 48% to over 52.5% in Congressional District 19 in the Catskills and the Hudson Valley (represented by Antonio Delgado), and from 49.23% to over 52.5% in Congressional District 24 in metropolitan Syracuse (represented by John Katko).[2] In view of these registration shifts over the past decade, seeing their successor districts

[2] These calculations are derived from data set forth on the New York State Board of Elections website, at https://www.elections.ny.gov/NYSBOE/enrollment/congress/congress_apr12.pdf and https://www.elections.ny.gov/NYSBOE/enrollment/congress/congress_Feb21.xlsx, of which this Court may take judicial notice. *See* Speaker's Ltr. p. 7 n.3.

under the enacted 2022 Congressional map lean more strongly toward Democrats should come as no surprise, and fail to support Petitioners' gerrymandering allegations.

Petitioners are no innocent defenders of what their Brief (at p. 1) calls "the most robust protections against political gerrymandering in the Nation." Rather, this Court should evaluate this lawsuit for what it is: the calculated strategy of Republican special interests (R. 1067-1089) to wrest the redistricting prerogative away from the Legislature consisting of the People's representatives elected statewide, toward their pre-selected Steuben County Judge (R. 41) elected among a population of less than ½ of 1% of New Yorkers, in the hope of achieving their preferred redistricting outcome other than what a majority of the Legislature would enact.

Only one month ago, this Court noted it "must remain cognizant of 'the distribution of powers in our State government' that render it improper for courts to lightly disregard the considered judgment of a legislative body that is also charged with a duty to uphold the Constitution[.]" *White*, 2022 WL 837573, at *3 (quoting, in part, *N.Y. Pub. Interest Research Grp., Inc. v. Steingut*, 40 N.Y.2d 250, 257 (1976)). As detailed in the Briefs of the Speaker, the Senate Majority Leader, and the Governor, New York's enacted 2022 Congressional plan is the product of the Legislature's considered judgment in fulfilling its mandate to balance the criteria required by Article III, § 4(c)(1) through § 4(c)(5) of the State Constitution, not as isolated silos, but as parts of an integrated whole.

In response, Petitioners and the Fourth Department plurality rely only upon Mr. Trende's simulations, and the absence of any Republican votes for that Congressional plan which they made no effort to amend (Speaker's Br. p. 6), to make an "*inference* … that the legislature engaged in unconstitutional partisan gerrymandering[.]" Plurality Opn. p. 5 (emphasis added). Yet Petitioners identify no proof in the record that the Legislature actually formulated the plan "*for the purpose* of favoring or disfavoring … [certain] political parties," because none exists. N.Y. CONST. art. III, § 4(c)(5) (emphasis added). And Mr. Trende's analysis of his deeply flawed simulations offers no adequate substitute. As the Whalen/Winslow dissent powerfully explains, assuming "unlawful intent on the part of individual legislators," as the Fourth Department plurality did with its claimed inference, "ignor[es] [the Court's] obligation to afford legislative

enactments 'a strong presumption of constitutionality'" and "impermissibly 'presum[es] an intent to pass an unconstitutional act[.]'" Whalen/Winslow Dissent pp. 11-12 (quoting in part, *inter alia*, *Schulz v. State*, 84 N.Y.2d 231, 241 (1994)). The evidence in the record fails to support the Fourth Department plurality's legal conclusion that Petitioners "established beyond a reasonable doubt that the legislature acted with partisan intent" in enacting New York's enacted 2022 Congressional plan, and this Court should validate the plan's constitutionality. Plurality Opn. p. 5.

## Remedy

Petitioners' arguments on the timing of any remedy in this lawsuit (which should be unnecessary anyway) are recycled from their Fourth Department Brief, and the Speaker has already addressed them. *See* Speaker's Reply Br. pp. 25-31; Speaker's Ltr. pp. 9-10.

Once again, Petitioners decline to acknowledge the authorities—including from this Court and the United States Supreme Court—allowing impending elections to proceed under unconstitutional or otherwise flawed maps. Speaker's Br. pp. 60-61; Speaker's Reply Br. p. 30. In fact, by citing *Goldstein v. Rockefeller*, Pet. Ltr. p. 5, Petitioners unwittingly add another case to the list: the Court there allowed an imminent election to proceed under an unconstitutional redistricting plan. 45 Misc. 2d 778, 788 (Sup. Ct. Monroe County 1965). The only other caselaw Petitioners cite regarding the timing of a remedy is *Landes v. Town of North Hempstead*, but that case does not discuss remedies at all. 20 N.Y.2d 417 (1967). Pet. Ltr. p. 5.

## Conclusion

For the reasons described in his letters and briefs, the Speaker respectfully requests that this Court:

- Accept Respondents' appeal;
- Reject Petitioners' attempt to appeal Supreme Court's determination that the Legislature has a right to enact any necessary remedial maps;
- Reinstate the enacted 2022 Congressional map;

- Affirm the Fourth Department's determination that the Legislature's enactment of district maps in February 2022 was not procedurally unconstitutional, and validate the enacted 2022 State Assembly and State Senate district maps;
- If this Court determines any remedial map is necessary, afford the Legislature a full and reasonable opportunity to draw that map; and
- Even if this Court determines a remedial map is necessary, allow the maps enacted in February 2022 to continue governing the ongoing election cycle.

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Respectfully,

Phillips Lytle LLP

By Craig R. Bucki

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